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December 31, 2005

Jeff Ottesen  
Alaska Department of Transportation and Public Facilities  
Statewide Planning Division - Division of Program Development  
3132 Channel Drive, Suite 200  
Juneau, Alaska 99801-7898

Re: Draft 2006-2008 STIP – Legal issues related to Juneau Access and Gravina Bridge.

Dear Jeff:

I am commenting on the draft FFY 2006-2008 Statewide Transportation Improvement Program (STIP) on behalf of clients opposed to the Juneau Access project and the Gravina Bridge project.

First, I compliment you on the improved format of the STIP with respect to project-specific information. Prior STIPs did not include project-specific information that the public had to dig out of other documents. The current draft STIP is better in that respect. I hope that DOT continues to add information that helps public review of projects and STIPs.

Second, I am sure you are aware that many local officials, legislators and members of the public have expressed concern that “mega-projects,” such as Gravina and Juneau Access, are funneling money away from other projects.

For a variety of reasons, I doubt that the Federal Highway Administration (FHWA) can lawfully approve the STIP with the Juneau Access and Gravina projects in it.

**A. ADOT Lacks a Legally Sufficient Long-Range Plan.**

As you know, FHWA approves a STIP pursuant to 23 USC 135(f)(4). It requires that FHWA determine whether the STIP is consistent with the planning requirements of 23 USC 135, which include the requirement at 23 USC 135(e) that states adopt a 20-year statewide long-range transportation plan developed under public processes which require that local officials and the general public to have opportunities to comment on the long-range plan. Although 23 USC 135 does not require that FHWA approve the statewide long-range transportation plan, 23 USC 135(f)(2)(C) does require that all of the projects in a STIP must be consistent with the statewide long-range plan.

Thus, in order for FHWA to approve a STIP, FHWA must determine (1) that the STIP is consistent with 23 USC 135 and (2) that each project is consistent with the long-range plan.

Even though FHWA does not approve the long-range plan, there must be a legally sufficient long-range plan in order to approve a STIP.

I doubt that ADOT's statewide long-range plan is legally adequate. My reasoning is as follows. First, as DOT has acknowledged many times, its statewide long-range plan consists of (1) a statewide, overall, policy document, referred to as "Vision 2020," and (2) a set of regional long-range transportation plans which operate as segments or "components" of the statewide long-range transportation plan.<sup>1</sup> Second, starting in about 1997 and over the course of several years, DOT developed regional long-range plans for Southeast Alaska, the Prince William Sound area, Southwest Alaska, Northwest Alaska, and the Yukon-Kuskokwim Delta. Each afforded an opportunity for comment by local officials and the public, and I expect that the vast majority of comments came from people and officials in the region at issue. However, when DOT or state statute at AS 44.42.050 simply denominate the regional plans as "components" of the statewide plan does not create an opportunity for the public or local officials to comment on a statewide basis on an overall statewide long-range transportation plan.

This shortcoming is brought to bear by the Juneau Access and Gravina Bridge projects. Most of the regional plans were adopted by 2001 or 2002. Although the Southeast Alaska Transportation Plan, as originally adopted in 2002, did not include either the Juneau Access or Gravina Bridge projects, that regional plan was revised in 2004 to include those projects. Anyone who wanted to promote projects in other regional plans, and who now objects that Juneau Access and Gravina are consuming funds for projects identified in those other regional plans, would have had to look beyond the geographic boundaries of those plans to anticipate, first, that Juneau Access and Gravina would be added to the revised Southeast Plan, and second, anticipate that those projects would be placed at such a high priority so as to take funds from other projects when Juneau Access and Gravina were included in this draft STIP.

The result is that people and local officials outside of Southeast Alaska – say in Soldotna, Whittier, Fairbanks, or Anchorage, for example – had no opportunity to comment on whether the Gravina bridge, for example, consumes so much funds that projects in other regions suffer by being delayed or deleted. The outcry you are receiving that projects in prior STIPs are being delayed or cancelled because of mega-projects is a direct result of the absence of any opportunity to comment on a document that weights those mega-projects on a statewide basis against other projects on a statewide basis. None of the regional plans did that. Yet, federal law requires meaningful opportunities for the public and local officials to comment and participate in the "statewide" long-range plan.

Hence, if FHWA approves the STIP with these projects in it, then FHWA's approval may be challenged by a complaint alleging that the approval is unlawful because the public and local

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<sup>1</sup> DOT's process of developing a statewide long-range transportation plan in regional components or segments is somewhat analogous to segmentation of a project, which is unlawful under NEPA.



officials never have had an opportunity to compare projects on a statewide basis and offer their views that local projects are a better expenditure of limited funds than the mega-projects.

The solution is straightforward, simple, and easily accomplished. ADOT needs to put all the regional plans and Vision 2020 in one document so that the public and local officials can comment on the whole. Until that occurs, FHWA's best course will be to strike the mega-projects that give rise to this issue.

**B. The Mega-projects Do Not Meet the Requirement that Full Funding Be Available During Time of Construction.**

Federal law, at 23 USC 135(f)(2)(D), provides that a STIP may include a project "only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project."

I have understood that the Gravina bridge project and the Juneau Access project are each estimated to cost approximately \$300 million, and the draft STIP allocates much less toward each project.

Both of these projects therefore raise the issue of whether or not FHWA can make a determination of whether full funding can reasonably be anticipated. Each project will consume a tremendous amount of federal and state funds for years after this STIP. Each will sacrifice or jeopardize the State's ability to meet other provisions of federal law, such as requirements for maintaining the existing system, and providing for safe and efficient transportation.

Therefore, when the mega-projects rely upon non-earmarked federal highway funds, the question of full funding comes into focus. I suspect that if FHWA approves the STIP with these projects included, then FHWA may again be vulnerable to a challenge that the approval would violate 23 USC 135(f)(2)(D).

Finally, in approving a STIP, FHWA also determines whether the overall STIP is "financially constrained" so as to be within overall available funds. Because the STIP commits to but only partly funds three or four mega-projects (Juneau Access, Gravina, Knik Bridge, and the Cook Inlet to Bristol Bay Corridor), the STIP is not financially constrained.

**C. These Problems are Compounded by Other Matters.**

These problems are compounded by three other matters.

The first the inconsistency between two different sets of "regions" DOT uses.

For all purposes except long-range planning, DOT divides the state into three regions depicted by DOT on a map at [http://www.dot.state.ak.us/stwdplng/cip\\_stip/map.shtml](http://www.dot.state.ak.us/stwdplng/cip_stip/map.shtml) – i.e., (1) the Southeast DOT region, covering all of southeast Alaska, with a regional office in Juneau, (2)

the Central DOT region, covering southcentral and southwestern Alaska, and with a regional office in Anchorage, (3) the Northern DOT region, covering interior, northern, northwestern, and eastern interior Alaska south to eastern Prince William Sound and the Gulf of Alaska coast, and with its regional office in Fairbanks.

However, for long-range planning, DOT designated the "regions" as those depicted on a map at [http://www.dot.state.ak.us/stwdplng/areaplans/areaplans\\_images/areaplan.txt](http://www.dot.state.ak.us/stwdplng/areaplans/areaplans_images/areaplan.txt).

When one compares the two maps, it appears that DOT's "regions" for purposes of regional long-range transportation plans minimize comment and participation by people and local officials from Anchorage, Fairbanks, the most of the road system. That is because the boundaries of the Southwest Alaska Transportation Plan, the Yukon-Kuskokwim Delta Transportation Plan, and the Northwest Alaska Transportation Plan exclude the urban and road system areas of the Central and Northern DOT regions. This discourages participation by residents of Fairbanks, Anchorage and the road system in commenting on projects in the regional plans, even though those projects compete, as you have said, for the same funds that could be used for projects in urban areas and on the existing road system.

The second matter that compounds all this is that DOT has not completed its regional long-range plans. DOT has yet to complete a regional plan covering the road system where most people live and from where I assume you are getting most objections. On the interconnected system, there are only long-range plans prepared by the metropolitan planning organizations of Anchorage and Fairbanks, and then only to the extent that those metropolitan planning entities plan funds allocated by federal statute as minimum amounts for those metropolitan areas.

A third matter that compounds all this is the role that regional DOT staff play. Regional staff play critical roles in preliminarily scoring and ranking projects to move them toward inclusion in a STIP. They do so without any basis for comparing public desire for projects off the road system to projects on the road system. This is because (1) none of the existing road system is covered by any long-range regional plan, and (2) the regional plans rely on public comment within the respective region, which excludes urban and road system residents and local officials.

**D. Juneau Access and Gravina Bridge are not Cost-Effective and this Compounds the Problem of Lack of Opportunity to Comment on a Statewide Long-range Transportation Plan.**

AS 44.42.050 requires that DOT assess the cost-effectiveness of projects, and the EIS on Juneau Access acknowledges that the project is not cost-effective. The Gravina Bridge project appears even worse in terms of cost-effectiveness.

When mega-projects are not cost-effective, the impact of the lack of opportunity to comment on a statewide basis on an overall statewide long-range plan is made worse, because mega-projects that are not cost-effective rise to the fore in the STIP, while cost-effective projects



that have been in prior STIPs are delayed or cancelled. This is not the type of planning envisioned or required by 23 USC 135 and its implementing regulations.

On a related matter regarding Juneau Access, DOT's examination of cost-effectiveness does not account for the costs and diminished benefit to people who do not travel with automobiles. Those people will bear additional costs of travel by bus or some other transport between Juneau and Katzechin.

**E. Improper Segmentation of the Juneau Access Project.**

Two projects in Skagway – i.e., the Skagway Sewage Utility project at the Alaska Marine Highway System terminal, and terminal modifications to allow stern loading – appear to be part of, or have cumulative impacts to, the Juneau Access project. I do not recall if they were addressed in the EIS on Juneau Access, but if not, then the EIS is deficient.

**F. Juneau Access and Gravina Bridge Contravene DOT Policy on Grandfathering Projects.**

Other clients of mine are presently litigating issues concerning DOT's grandfathering policy. Nevertheless, that policy gives a high priority to projects in a prior STIP that were not conducted under that prior STIP.

The elevation of mega-projects in this draft STIP that result in delay or cancelling of other projects in prior STIPs is contrary to the policy.

**G. Juneau Access and Gravina Compound "Time-Trap" Issues.**

As you know, 23 USC 102(c) provides that if on-site construction of a highway project is not commenced within 10 years after federal highway funds are first made available for preliminary engineering of the project, the state shall repay the federal funds made available for such engineering.

As of more than a year ago, I understood that the State had about 60 projects facing an issue of possible repayment. Juneau Access, Gravina, and other mega-projects are likely to compound this problem.

## **CONCLUSION**

Again, the format STIP is more informative than before.

However, I doubt that FHWA can approve the STIP with the mega-projects in it. Furthermore, this draft STIP, perhaps like others before it, reflect the priorities of incumbent politicians. Transportation planning must be more stable than political priorities and who occupies the governor's chair. Otherwise, STIPs will be forever condemned to reflecting who is in power rather than planning.

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The cure is obvious. The mega-projects should be deleted from the STIP, until a single statewide long-range plan, with all components, is subjected to public comment as required by 23 USC 135(e), so that the public and local officials can comment and DOT can use their comments to set priorities.

Thank you for this opportunity to comment on the STIP. My clients are still waiting for and would appreciate a similar opportunity on a statewide long-range transportation plan.

Sincerely yours,

Geoffrey Y. Parker